1976

The Constitutionality of the No-Notice Provisions of the Uniform Probate Code

Minn. L. Rev. Editorial Board

Note: The Constitutionality of the No-Notice Provisions of the Uniform Probate Code

The Uniform Probate Code (UPC) provides for the settlement and administration of estates by both formal and informal procedures and by private action.[1] Under the formal procedures of the Code, interested parties[2] whose names and addresses are known must be notified of the settlement of the estate. These proceedings clearly satisfy the due process notice requirements of the fourteenth amendment to the United States Constitution.[3] Notification of interested parties is not required, however, under the informal procedures and the private action authorized by the Code. Considerable debate has arisen over whether these no-notice provisions[4] violate due process of law. This Note will examine this issue in light of both the history of statutory notice requirements in probate proceedings and current developments in the concept of procedural process.

I. THE NO-NOTICE PROVISIONS OF THE UNIFORM PROBATE CODE

The American colonies drew their procedures for probating wills from those originated by the English ecclesiastical courts.[5] A will could be probated in England by common form or solemn form.[6] Common form probate was an ex parte, summary proceeding in which no notice was furnished to interested parties.[7] Interested parties could challenge common form probate, however, by subsequently initiating proceedings in solemn form, or they could avoid common form probate altogether by initiating solemn form proceedings in the first instance. Solemn form pro-

1. *See* text accompanying notes 31-55 *infra*.
2. UNIFORM PROBATE CODE § 1-201(20). That section defines "interested parties" as heirs, devisees, children, spouses, creditors, beneficiaries and any others having a property right in or claim against" a decedent's estate. Also included are "persons having priority for appointment as personal representative, and other fiduciaries representing interested persons."
3. *See* Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950).
4. *See* text accompanying notes 56-58 *infra*.
5. A. REPPY & L. TOMPKINS, THE LAW OF WILLS 159-60 (1948); Simes, *The Function of Will Contests*, 44 MICH. L. REV. 503, 505 (1964).
6. L. SIMES & P. BASYE, PROBLEMS IN PROBATE LAW 388 (1946).
7. A. REPPY & L. TOMPKINS, *supra* note 5, at 112.

bate, regardless of when begun, required notification of all interested parties as well as a formal adversary proceeding to prove the will.[8] The result of such a proceeding became conclusive immediately,[9] while a result reached in common form remained inconclusive until a period of limitations had expired.[10] Under either approach, English probate proceedings determined succession only to personal property. Title to real property passed automatically to devisees when the testator died. The validity of the will under these circumstances could be contested, but only through an action for trespass or ejection.[11]

While American courts have adopted the basic English framework, they nevertheless have made some substantive changes. The differentiation between land and personalty has been discarded; American courts in the earliest of cases probated wills involving devises of land.[12] A second departure has been the gradual legislative abandonment of common form probate.[13] Professor Simes has suggested that once the probate courts had expanded their jurisdiction to include wills concerning realty as well as personalty, it became inevitable that common form probate would be eliminated.[14] For although the simpler proceeding may have been a tolerable mechanism for disposing of estates consisting only of personalty, its failure to require notice became especially objectionable where real property was involved. Indeed, Simes observes, prior notification of interested parties is essential to "the American conception of procedure."[15] In any event, it is clear that the tendency of American legislatures has been to require notice of the probate of wills and the administration of estates.[16] Not only do modern probate statutes in a sub-

8. *Id.* at 112-13; L. SIMES & P. BASYE, *supra* note 6, at 439.
9. A. REPPY & L. TOMPKINS, *supra* note 5, at 113.
10. *Id.* Scholars disagree as to whether the period of limitations was 10 or 30 years. *Id.* n.136.
11. *Id.* at 114; L. SIMES & P. BASYE, *supra* note 6, at 439.
12. A. REPPY & L. TOMPKINS, *supra* note 5, at 180; Simes, *supra* note 5, at 511.
13. Simes, *supra* note 5, at 524. *See also* Wellman, *The Uniform Probate Code: Blueprint for Reform in the 70's*, 2 CONN. L. REV. 453, 458 (1970).
14. Simes, *supra* note 5, at 524.
15. *Id.*
16. The admission of a will to probate without *prior* notification of interested parties should be distinguished from settlement of an estate without notification at *any* point in the proceedings, a procedure sanctioned under the no-notice provisions of the UPC. *See* notes 34-47 *infra* and accompanying text.

stantial majority of states provide for prior notice,[17] but the number of states adopting this requirement is steadily increasing.[18] In most states in which common form probate is still allowed, notice is required at least at some later stage of the proceedings.[19]

The Model Probate Code (MPC) and the UPC, two comprehensive codifications of probate law,[20] represent the most recent developments relevant to the issue of notice requirements in probate proceedings. Introduced in 1946, the MPC was the first major attempt to revise probate law and establish uniform probate procedures among the states. Several states subsequently amended their laws,[21] but no state adopted the MPC in toto. The MPC retained common form probate, permitting probate and appointment of a personal representative without prior notification of interested parties.[22] Where no prior notice was given, however, the clerk of court was required to personally serve or mail notice to all interested parties before the estate could be finally settled.[23] Interested parties were thus accorded the opportunity to request reconsideration of all matters previously resolved.[24] Under the scheme of the MPC, then, proceedings could be initiated without notice, but the requirement that subsequent notice be provided in all cases was retained.[25] De-

17. Basye, *Determination of Heirship*, 54 MICH. L. REV. 737, 745 (1956).

18. A survey of state law in 1945 showed that 19 states permitted the probate of a will without prior notification of interested parties. Note, *Administration of Estates—Requirement of Notice for Probate of Wills or Grant of Letters of Administration*, 43 MICH. L. REV. 1153, 1155-56 (1945). A similar survey published in 1952 revealed that the number of states permitting common form probate had decreased to 17. Levy, *Probate in Common Form in the United States: The Problem of Notice in Probate Proceedings*, 1952 WIS. L. REV. 420, 422 (1952).

19. Simes, *The Administration of a Decedent's Estate as a Proceeding In Rem*, 43 MICH. L. REV. 675, 694 (1945); *Estate Administration: Current Practices and Proposed Uniform Probate Code*, 3 REAL PROPERTY, PROBATE & TRUST L.J. 143 (1968); Note, *Requirements of Notice in In Rem Proceedings*, 70 HARV. L. REV. 1257, 1269 (1957); Comment, *1967 Draft of the Uniform Probate Code*, 53 IOWA L. REV. 508, 516 (1967).

20. The Model Probate Code was a joint project of the University of Michigan Law School and the Real Property, Probate and Trust Law section of the American Bar Association. The Uniform Probate Code was a continuation of the attempt to unify and modernize probate law. *Uniform Probate Code Approved by Council*, 4 REAL PROPERTY, PROBATE & TRUST L.J. 206, 207 (1969).

21. *Id.*

22. MODEL PROBATE CODE § 68 (1946).

23. *Id.* § 70.

24. L. SIMES & P. BASYE, *supra* note 6, at 16.

25. MODEL PROBATE CODE §§ 64-81 (1946); Niles, *The MPC and Mono-*

spite this approach, the notice provisions of the MPC were labeled inadequate.[26]

The Uniform Probate Code, a continuation of the attempt to simplify and modernize probate law, has had an immediate impact on state law. Since the National Conference of Commissioners on Uniform State Laws and the American Bar Association adopted it in 1969, the UPC has been enacted in 10 states.[27] Under certain circumstances, the UPC allows wills to be probated, intestacy to be established, and estates to be administered without prior or subsequent notification of interested parties.[28] It is readily apparent that the absence of notice provisions in the UPC constitutes a significant departure from American common law, from existing statutes, and from the MPC.[29]

The substantive aspects of the UPC are simple. The estate of a decedent "devolves to the persons to whom it is devised by his last will . . . or in the absence of testamentary disposition to his heirs . . . subject to . . . rights of creditors, . . . and to administration."[30] The procedural scheme of the UPC, however, is complex. A multitude of procedural alternatives are provided to afford interested parties flexibility in settling estates.

UPC procedures can be grouped into three categories: first, probate and administration without judicial sanction; second, informal probate and informal appointment of a personal representative; and third, formal testacy proceedings, formal probate, and formal appointment of a personal representative. These proceedings may be employed in any combination to settle an estate.[31] Since the basic premise of the UPC is that the role

---

graphs on Probate Law: A Review, 45 MICH. L. REV. 321, 327 (1947); Wellman, *supra* note 13, at 464. Notice was not required, however, before small estates could be probated. MODEL PROBATE CODE §§ 86-92 (1946).

26. There is a good deal of detail about how notice is to be given when it is given; but the fact remains that things may be done in the first instance of which a party who has an interest in the proceding has no initial notice.

Twyeffort, *The Model Probate Code*, 22 N.Y.U.L. REV. 63, 67 (1947). *But see* Wellman, *supra* note 13, at 464-65.

27. The 10 states that have enacted the UPC are Alaska, Arizona, Colorado, Idaho, Minnesota, Montana, Nebraska, North Dakota, South Dakota, and Wisconsin.

28. *See* text accompanying notes 31-63 *infra*.

29. *See* text accompanying notes 12-26 *supra*.

30. UNIFORM PROBATE CODE § 3-101.

31. *Id.* § 3-107 & Comment. For example, an informally probated will may be administered by a formally appointed personal representative.

of the court in settling an estate should be passive,[32] interested parties themselves must initiate action to make particular Code procedures operational.[33]

The first group of procedures, under which estates may be settled without any judicial involvement, includes no requirement that notice be provided to interested parties. Once an estate is settled by private action, if no will is presented for probate within three years after the death of the decedent, intestacy and the interests of heirs are irreversibly established by the mere passage of time.[34] Furthermore, devisees under an unprobated will or statutory heirs may divide and distribute the assets of the estate among themselves without the services of an appointed personal representative.[35] These options are withdrawn, however, if an interested party petitions within certain time limits[36] for formal probate of a will,[37] formal adjudication of intestacy,[38] or formal appointment of a personal representative.[39]

The second group of UPC procedures, which provides for settlement of estates through informal probate of wills[40] and informal appointment of personal representatives,[41] allows a will to be proved in a nonjudicial,[42] ex parte proceeding. Again, notification of interested parties is not required.[43] An informally

32. *Id.* art. III, General Comment.
33. *See, e.g., id.* §§ 3-301, 3-401.
34. *Id.* §§ 3-102 & Comment, 3-108 & Comment, 3-1006 & Comment.
35. *Id.* §§ 3-107 & Comment; 3-102, Comment; 3-101 & Comment; 3-901 & Comment; art. III, General Comment. The rights to a decedent's property established in section 3-101 are complemented by procedures in sections 3-107 and 3-901 that facilitate distribution without appointment of a personal representative.
36. *Id.* § 3-108(3). *See also* text accompanying note 34 *supra.*
37. UNIFORM PROBATE CODE § 3-401.
38. *Id.*
39. *Id.* § 3-414.
40. *Id.* § 3-301.
41. *Id.*
42. *Id.* § 3-302 & Comment. An interested party applies for informal probate by submitting to a registrar an application containing a sworn statement that the detailed requirements for an informal probate petition have been met. *Id.* § 3-301. On receiving an application, the registrar does little more than examine the documents to determine whether they are complete and in conformity with the technical requirements of the Code. *Id.* § 3-303(a). If his determination is favorable, the registrar then issues a written statement of informal probate. The registrar may, in his discretion, decline informal probate, however, even though all statutory requirements have been met. *Id.* § 3-305. For definition of "registrar," see note 61 *infra.*
43. Section 3-306 of the Code requires that notice of informal probate be provided to "(1) any person demanding it pursuant to Section

probated will is conclusive against all parties unless formal testacy proceedings are commenced within one year of the proceeding or three years of the death of the testator, whichever is later.[44] If the interested parties elect to utilize a personal representative, the appointment may be made informally and, again, without providing notice to interested parties.[45] Although informal appointment proceedings are conducted without notice, they establish full powers and duties in the personal representative.[46] And while the Code imposes on all personal representatives the duty to inform heirs and devisees of their appointment, failure to do so affects neither the validity of the appointment nor the powers the personal representative may exercise.[47]

The third group of UPC procedures, which provides for settlement of estates through formal testacy proceedings,[48] formal probate of wills,[49] and formal appointment of personal representatives,[50] must be conducted under court supervision[51] and must be preceded by notification of all interested parties.[52] A formal testacy proceeding involves adjudication to determine whether the decedent has left a valid will;[53] the formal probate of a will bars informal probate of any will of the decedent.[54] Similarly, formal proceedings for the appointment of a personal representative operate to enjoin the action of an informally appointed representative.[55]

Thus, in three instances the UPC permits an estate to be conclusively settled without notification of interested parties.

3-204; and (2) to any personal representative . . . . No other notice of informal probate is required."

44. UNIFORM PROBATE CODE § 3-108(3).

45. Section 3-310 of the Code requires that notice of informal appointment proceedings be provided to "(1) any person demanding it pursuant to Section 3-204; and (2) to any person having a prior or equal right to appointment . . . . No other notice of an informal appointment proceeding is required."

46. UNIFORM PROBATE CODE § 3-307(b).

47. *Id.* § 3-705.

48. *Id.* § 3-401.

49. *Id.*

50. *Id.* § 3-414.

51. "Court" is defined in the Code as "the Court having jurisdiction in matters relating to decedent's affairs." *Id.* § 1-201(3).

52. *Id.* §§ 3-401, 3-414(b).

53. *Id.* § 3-401.

54. A court in formal testacy proceedings may enjoin or set aside an informal probate and may decree that the decedent died testate or intestate. *Id.*

55. *Id.*

The first occurs where there is no will, the three-year period for presentation expires, and no personal representative is appointed.[56] The second is the informal probate of a will without the appointment of a personal representative.[57] The third occurs where a will is probated informally or intestacy is established by the passage of time, and an informally appointed personal representative fails to give the required notice of his appointment.[58]

Two examples illustrate the potential adverse effects of the no-notice provisions of the UPC. First, a statutory heir may be deprived of the right to assert his interest in the estate of a decedent. Assume *X* dies, leaving a will naming *A* as sole devisee. *B*, *X*'s only living heir, lives several hundred miles away and is unaware of the death of *X*. *A* probates the will informally, and either does not seek the informal appointment of a personal representative, or the informally appointed representative fails to notify *B* of his appointment. If *B* fails to attempt to set aside the informal probate by petitioning for a formal proceeding within three years of the death of *X*, he will lose the right to assert his interest in the estate. Second, a devisee may be deprived of the right to assert his interest. Assume *X* dies, leaving a will naming his old boyhood chum, *B*, as sole devisee. *B* lives in another part of the country and has been out of touch with *A* for many years. *A*, *X*'s only heir, neither searches for nor finds the will, or searches for the will and finds it but has reason to believe that it was properly revoked by *X*. *A* takes possession of *X*'s property and does nothing for three years. If *B* fails to attempt to probate the will formally or informally within three years of the death of *X*, he loses his rights as devisee.

Since the procedures illustrated in these examples may deprive interested parties of their rights, and since the self-interest of the initiating party determines which procedure is used in settling the estate,[59] the UPC attempts to provide some safeguards against possible abuses. First, any person injured by fraud "in connection with" any UPC provision or by fraud employed to avoid the provisions of the Code may sue for damages.[60] Second, the registrar[61] may decline an application

56. *Id.* § 3-108.
57. *Id.* § 3-306.
58. *Id.* § 3-705.
59. *Id.* § 3-501, Comment; art. III, General Comment.
60. *Id.* § 1-106.
61. " 'Registrar' refers to the judge of the court or the person designated by the court to perform the functions of Registrar as provided in

for informal probate.[62] Third, every personal representative must notify all known heirs and devisees of his appointment.[63]

II. DUE PROCESS AND NO-NOTICE PROBATE

Courts in several early state and federal cases indicated that common form probate and probate after constructive notice satisfied the due process requirements of the fourteenth amendment.[64] These courts emphasized the interests of the state in closing estates[65] and, primarily, the in rem nature of probate proceedings.[66] While courts cannot exercise in personam jurisdiction unless the parties are notified of the attempted exercise of jurisdiction and of their right to appear and be heard,[67] courts in early nonprobate cases[68] exercised in rem jurisdiction based on their control over the res coupled with a minimal form of notice.[69] And since parties in probate proceedings sought to establish clear title to property located within the territorial limits of a state,[70] such proceedings were classified as in rem.[71]

The Supreme Court in modern due process decisions has recognized, however, that the constraints of in rem jurisdiction afford inadequate due process protection to litigants; it has therefore separated the issue of jurisdiction over the res from that of notice. Thus, in *Mullane v. Central Hanover Trust Co.*[72] the

---

section 1-307," *id.* § 1-201(36), which provides that the acts and orders performable by the registrar "shall be performed by a judge of the court or by a person, including the clerk, designated by the court by a written order filed and recorded in the office of the court." *Id.* § 1-307. *See* note 42 *supra.*

62. MODEL PROBATE CODE § 3-305 (1946).

63. *Id.* § 3-705.

64. Christianson v. King County, 239 U.S. 356 (1915); Farrell v. O'Brien, 199 U.S. 89 (1905); Robertson v. Pickrell, 109 U.S. 608 (1883); Case of Broderick's Will, 88 U.S. (21 Wall.) 503 (1874); Darby's Lessee v. Mayer, 23 U.S. (10 Wheat.) 465, 468 (1825); Knight v. Hollings, 73 N.J. 495, 500, 63 A. 38, 41 (1906). *See also* Comment, *Probate Proceedings—The Mullane Case and Due Process of Law,* 50 MICH. L. REV. 124, 132-33 (1951).

65. Case of Broderick's Will, 88 U.S. (21 Wall.) 503, 509 (1874).

66. *Id.* at 519.

67. Wuchter v. Pizzutti, 276 U.S. 13 (1928). *See* Note, *Requirements of Notice in In Rem Proceedings,* 70 HARV. L. REV. 1257 (1957).

68. *E.g.,* Pennoyer v. Neff, 95 U.S. 714, 722 (1877). *See also* Note, *supra* note 67, at 1257.

69. Note, *supra* note 67, at 1261; Comment, *supra* note 64, at 127.

70. Note, *supra* note 67, at 1260.

71. *See* Case of Broderick's Will, 88 U.S. (21 Wall.) 503, 509 (1874).

72. 339 U.S. 306 (1950). The *Mullane* case involved the administration of a trust. A state statute provided that a trust company could ob-

Court explicitly rejected the notion that notice is somehow satisfied by the metaphysical qualities of in rem jurisdiction and focused instead on the extent to which notice is actually calculated to reach interested parties.[73] Since *Mullane*, lower courts have properly disregarded in rem characterizations and rather have determined whether the particular notice was adequate.[74] And although the Supreme Court has yet to deal specifically with notice requirements in probate proceedings,[75] it has applied the *Mullane* standard in analogous situations.[76]

The existence in any form of a notice requirement, however, depends on whether the particular interest for which such protection is sought is within the range of those constitutionally recognized interests the deprivation of which must be attended by procedural due process. In probate proceedings, then, the initial issue to be resolved is whether the interest of heirs and devisees in succeeding to the estate of a decedent is "property" within the meaning of the fourteenth amendment.[77]

The Constitution itself contains no requirement that legislatures provide for succession to the estates of decedents. Moreover, a citizen has no absolute right to dispose of his property by will:

> Though the general consent of the most enlightened nations has, from the earliest historical period, recognized a natural right of children to inherit the property of their parents, we know of no legal principle to prevent the legislature from taking away or

---

tain a judicially approved settlement of its accounts after merely publishing notice of the hearing to be held for that purpose. The Supreme Court held that this procedure deprived beneficiaries, whose whereabouts were known, of their property rights, and therefore violated due process of law.

73. *Id.* at 312. *See* Walker v. City of Hutchinson, 352 U.S. 112 (1956). *See also Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909, 989 (1960).

74. *See, e.g.*, Cordner v. Metropolitan Life Ins. Co., 234 F. Supp. 765 (S.D.N.Y. 1964).

75. State courts, however, have discussed the application of *Mullane* to probate proceedings. *See, e.g., In re* Pierce's Estate, 245 Iowa 22, 60 N.W.2d 894 (1953); New York Merchandise Co. v. Stout, 43 Wash. 2d 825, 264 P.2d 863 (1953). *But see* Comment, *1967 Draft of Uniform Probate Code*, 53 IOWA L. REV. 508 (1967); Comment, *Adequacy of Process*, 32 WASH. L. REV. 165, 178-79 (1957).

76. *See, e.g.*, Walker v. City of Hutchinson, 352 U.S. 112 (1956) (eminent domain proceeding); City of New York v. New York, N.H. & H.R.R., 344 U.S. 293 (1953) (Bankruptcy Act proceeding). *See also Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909, 989-91 (1960).

77. "[N]or shall any State deprive any person of . . . property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

> limiting the right of testamentary disposition or imposing such conditions on its exercise as it may deem conducive to the public good.[78]

Nevertheless, the interest of an heir or devisee in succeeding to the estate of a decedent may be vested by statute. The UPC, for example, provides:

> [U]pon the death of a person, his real and personal property devolves to the persons to whom it is devised by his last will . . . or in the absence of testamentary disposition, to his heirs . . . .[79]

Thus, states adopting the UPC have created a statutory right to inherit.

Rights that originate in statutes have gained constitutional status in recent Supreme Court decisions—decisions in which the Court has repeatedly found that statutorily created interests are property that must be afforded the protections of procedural due process.[80] Thus, the absence of a constitutional right to inherit is of no moment for purposes of the fourteenth amendment. The UPC nevertheless purports to limit the right to inherit by subjecting it to the no-notice provisions:

> The power of a person to leave property by will, and the rights of creditors, devisees, and heirs to his property are subject to the restrictions and limitations contained in this Code to facilitate the final settlement of estates.[81]

In limiting the right it creates, the UPC runs afoul of the Constitution. Since a protected property interest is at stake in proceedings for the settlement of an estate, the fundamental requirements of due process must be observed. Minimally, then, interested parties must be notified of the settlement of the estate and must be accorded the opportunity to be heard at the probate proceeding.

UPC proponents reject this analysis of the requirements of procedural due process and advance several arguments in support of the no-notice provisions of the Code. They argue first that the UPC contains various protective devices that make notice unnecessary.[82] These devices are the antifraud provision,[83] the power

78. United States v. Perkins, 163 U.S. 625, 628 (1896).

79. UNIFORM PROBATE CODE § 3-101.

80. *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564 (1972) (employment rights of untenured faculty); Bell v. Burson, 402 U.S. 535 (1971) (driver's license and motor vehicle registration); Goldberg v. Kelly, 397 U.S. 254 (1970) (statutory entitlement of qualified person to welfare benefits).

81. UNIFORM PROBATE CODE § 3-101.

82. Manlin & Martens, *Informal Proceedings under the Uniform Probate Code: Notice and Due Process*, 3 J.L. REFORM 39, 46-50 (1969).

83. UNIFORM PROBATE CODE § 1-106.

of the registrar to decline an application for informal probate,[84] and the requirement that every personal representative notify all known heirs and devisees of his appointment.[85]

Protective devices alone, however, cannot rebut a constitutional challenge to the notice provisions of the UPC. If a procedure is constitutionally defective because it fails to provide adequate notice, only "notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action" will cure that defect.[86]

Moreover, these protective devices can be criticized on practical grounds as simply inadequate and unworkable. The antifraud provision, for example, is clearly inadequate since the fraud action must be initiated by the very party who has been deprived of notice.[87] If that party does not discover the fraud, the remedy is meaningless. In addition, a fraud action may be difficult to prove—to recover on a fraud theory, a devisee who failed to assert a timely claim under a will must prove that the statutory heirs knew of the existence of the will.[88] Even if

---

84. *Id.* § 3-305.
85. *Id.* § 3-705.
86. Mullane v. Central Hanover Trust Co., 339 U.S. 306, 314 (1950).
87. UNIFORM PROBATE CODE § 1-105.
88. The UPC provides a cause of action to any person injured by fraud in connection with any proceeding or any statement filed under the Code or by fraud employed in circumvention of the provisions of the Code. *Id.* § 1-106. The Code fails to define fraud, however, and, as a result, it is unclear what, if anything, this section adds to existing common-law or statutory fraud actions.

A common-law deceit action is based on a false representation made by the defendant and knowledge or belief on his part that the representation is false. W. PROSSER, THE LAW OF TORTS 685 (1971). Where statutory heirs succeed to an estate through intestacy established by the passage of time no representations with respect to the existence of a will are made. A common-law deceit action would therefore be unavailable. In some jurisdictions, however, nondisclosure of facts of which the defendant has knowledge can serve as the basis for a fraud action. *Id.* at 695. This is particularly true where the relationship of the parties is a fiduciary one, such as that of executor and beneficiary of an estate. Murphy v. Cartwright, 202 F.2d 71 (5th Cir. 1953). But it is doubtful that statutory heirs would be held fiduciaries of potential devisees. Even assuming that the less stringent definition of fraud applies to actions under the UPC, devisees would still be required to prove that heirs had knowledge of the undisclosed fact, *i.e.*, the existence of a will.

The language of the UPC section providing a cause of action where fraud is used to avoid or "circumvent the provisions of the Code . . . ," UNIFORM PROBATE CODE § 1-106, does not alter the forgoing analysis and conclusions. Statutory heirs succeeding to an estate through intestacy established by the passage of time are not required to search for a will or disclose its existence if one is found.

knowledge were proven, the heirs might successfully defend on the ground that they reasonably believed the will had been revoked.[89] Finally, the antifraud provision is an inadequate remedy since fraud victims in some cases cannot recover specific estate property. Distributees who improperly obtain property of an estate through a personal representative may convey good title to the property,[90] and purchasers are protected even though they failed to inquire into the propriety of the distribution.[91]

The power of the registrar to deny informal probate is also a meaningless protection. The registrar may merely be a clerk who examines informal probate petitions to determine if they are complete.[92] Even though he has the statutory power to reject complete petitions, it is of little value as a protective device, since he has neither statutory standards on which to base his decisions nor independent investigatory powers.[93]

The final protective device, the requirement that personal representatives notify interested parties of their appointment, is inadequate for two reasons: first, the appointment of a personal representative is itself not required,[94] and second, the failure of an appointed representative to provide notice affects neither the validity of his appointment nor his powers.[95]

UPC proponents also argue that due process requirements are fixed by common-law practice. Since the informal procedures of the Code resemble common form probate as it existed both in England and in colonial America, proponents maintain that informal probate cannot be violative of due process.[96]

---

89. *See* note 88 *supra.*

90. UNIFORM PROBATE CODE §§ 3-907 to -910 & Comments.

91. *Id.* § 3-910. Purchasers are protected only if a personal representative distributes or releases the property. A personal representative has the power to distribute or release property even though he fails to notify heirs and devisees of his appointment. *Id.* § 3-705. *See* text accompanying note 47 *supra.*

92. *See* note 42 *supra.*

93. *See* UNIFORM PROBATE CODE § 3-305 & Comment. It is highly unlikely that the registrar would learn of the existence of interested and uninformed parties by merely examining the petition.

94. *Id.* § 3-705, Comment.

95. *Id.* § 3-705.

96. *See* L. SIMES & P. BASYE, PROBLEMS IN PROBATE LAW 506, 511-12 (1946); Manlin & Martens, *supra* note 82, at 52-55; *Developments in the Law—State-Court Jurisdiction,* 73 HARV. L. REV. 909, 990 (1960); Comment, *Probate Proceedings—The Mullane Case and Due Process of Law,* 50 MICH. L. REV. 124, 132-33 (1951). *See also* Ownbey v. Morgan, 256 U.S. 99, 110 (1921):

Although informal probate does resemble its common-law antecedent, the two differ in one significant respect: the length of time during which a will may be contested.[97] And while authorities disagree over the period of limitations at common law, the shortest estimate is 10 years.[98] The UPC, however, makes an informally probated will conclusive one year after it is accepted by the registrar or three years after the testator dies, whichever is later.[99] In light of the localized social structure of seventeenth-century England, a 10-year statute of limitations was very long. Family members in the small, nonmobile English society lived in close proximity, enhancing the possibility that notice actually would be received. In a large, mobile society such as contemporary America, where family members often are separated by great distances, a one- to three-year statute of limitations not only is actually shorter, but relatively shorter as well.

It must be noted that of the two most significant no-notice provisions of the UPC—intestacy established by the passage of time and informal probate—only the latter has any historical precedent. But even if it were conceded that each of the no-notice provisions of the UPC has a direct analogue in English common law,[100] constitutionality of the provisions would remain problematical. Due process of law is a dynamic concept—if every procedure followed in seventeenth-century England were allowed to control American jurisprudence, there would be little change or improvement in the law.[101] Furthermore, the Supreme Court has declared that the legitimacy accorded certain procedures under English common law should not be considered in defining contemporary due process requirements if those procedures were not followed in this country after it gained inde-

> A procedure customarily employed, long before the Revolution, in the commercial metropolis of England, and generally adopted by the states as suited to their circumstances and needs, cannot be deemed inconsistent with due process of law.

97. *See* notes 6-10 *supra* and accompanying text.

98. *See* note 10 *supra.*

99. UNIFORM PROBATE CODE § 3-108.

100. Intestacy by passage of time lacks historical precedent because American courts had full control over intestate succession. Intestacy simply could not be established without the aid of a court. *See* Wellman, *The Uniform Probate Code: Blueprint for Reform in the 70's,* 2 CONN. L. REV. 453, 460 (1970).

101. It does not follow, however, that a procedure settled in English law at the time of the emigration, and brought to this country and practiced by our ancestors, is an essential element of due process of law. If that were so the procedure of the first half of the seventeenth century would be fastened upon the American jurisprudence like a straight jacket . . . .

Twining v. New Jersey, 211 U.S. 78, 101 (1908).

pendence.[102] Since the American colonies made substantial changes in English probate proceedings, including the rejection in several colonies of common form probate,[103] the English probate procedures can be regarded as unsuited to the civil and political conditions of the United States, and therefore not determinative of constitutional due process requirements.

Supporters of the UPC have also argued that interested parties are protected inasmuch as they may contest or appeal the initial ex parte decision within the one- to three-year period of limitations.[104] Their position is simply that informal probate is not in itself final. A temporary deprivation of an interest in an estate, they assert, does not run counter to the requirements of procedural due process.[105] The Supreme Court has held, however, that even temporary deprivations of property interests are deprivations within the meaning of the fourteenth amendment.[106] Moreover, the Court also has dealt specifically with the effect of a statute of limitations on the requirements of due process. In *Schroeder v. City of New York*[107] it held that posted notice of condemnation proceedings failed to satisfy due process requirements and that a statutory time period during which land owners could appeal the condemnation decision failed to cure the constitutionally defective notice. *Schroeder* has been cited for the proposition that the lack of finality afforded by a statute of limitations will not be an adequate defense

102. Powell v. Alabama, 287 U.S. 45, 65 (1932).
103. *See* text accompanying notes 12-14 *supra.*
104. *See* text accompanying note 44 *supra.*
105. *See* Manlin & Martens, *supra* note 82, at 55-57.
106. Fuentes v. Shevin, 407 U.S. 67 (1972). In a more recent case, however, seizure of property without prior notice and hearing was permitted. Mitchell v. W.T. Grant, 416 U.S. 600 (1974). The Supreme Court in *Mitchell* upheld a Louisiana statute permitting a mortgagee or lien holder to obtain a writ of sequestration to prevent waste or alienation of encumbered property. Such a writ could be obtained on ex parte application without notifying the debtor or affording him an opportunity to be heard.

The statutory scheme involved in the *Mitchell* case can be distinguished from the no-notice provisions of the UPC, however, since the Louisiana statute provided for mandatory notice and hearing immediately following seizure of the property:

> Under Louisiana procedure . . . the debtor, Mitchell was not left in limbo to await a hearing that might or might not "eventually" occur, as he was under the statutory schemes before the Court in *Fuentes.*

Id. at 618. Under UPC procedures there is no assurance that interested parties ever will be notified. The no-notice provisions permit estates to be conclusively settled without notice. *See* text accompanying notes 56-58 *supra.*
107. 371 U.S. 208 (1962).

against a due process attack based on an assertion of inadequate notice.[108]

Aside from its weakness as a constitutional doctrine, there are serious practical problems with the "lack of finality" argument as well. The three-year period for challenging or initiating probate is of little utility to a party who, because of lack of notice, is simply unaware of the fact that his interests are at stake.[109]

Proponents of the UPC argue further that death provides natural notice of probate proceedings.[110] The obvious answer to the "natural notice" argument is that the contemplated notice does not satisfy the *Mullane* requirement of notice "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action."[111] Distant collateral heirs, for example, may not learn of the death of their relative[112] and, even if they do, might assume that they have no interest in the estate. The problem is most acute for devisees. Charitable institutions, in particular, are frequently named in wills prepared by persons unknown to them. Thus it cannot be said that they receive automatic notice of their interest through the death of a testator.

Yet another argument is that some of the UPC proceedings are nonadjudicative and therefore not subject to due process requirements.[113] Its proponents base this argument on the

108. *See* Boyd, *Some Suggestions for a Model Estates Code*, 47 MINN. L. REV. 787, 801-02 (1963); Comment, *1967 Draft of Uniform Probate Code*, 53 IOWA L. REV. 508, 514 n.44 (1967). *But see* Manlin & Martens, *supra* note 82, at 57.

109. *Cf.* text accompanying note 87.

110. *See* Manlin & Martens, *supra* note 82, at 56.

111. 339 U.S. at 314.

112. One statistical analysis suggests that approximately 13 percent of all estates involve no known kin or collateral kin only. Wellman, *Probate Bonds and the Uniform Probate Code*, in U.P.C. KEY MAN SEMINAR 121, 126 (1970). In a large, mobile society where family members frequently are separated by long distances, the "natural" notice of death cannot be said to be "reasonably calculated, under all the circumstances, to apprise" collateral heirs of probate proceedings. *Cf.* text accompanying notes 98-101 *supra*.

Collateral heirs have a direct interest in an estate to which they may succeed through the laws of intestacy. In *Mullane*, the Supreme Court held that notice by publication was constitutionally sufficient for those trust beneficiaries whose interests were conjectural or contingent. 306 U.S. at 317. Collateral heirs are analogous to contingent trust beneficiaries so long as there exist lineal heirs with priority over them. But where the collateral heirs have priority under the laws of intestacy, their interest is direct and must be accorded due process protection. *See* note 124 *infra*.

113. *See* Wellman, *supra* note 100, at 463-67.

notion that the registrar, who oversees the informal probate of wills, has the limited, nonjudicial function of administering the nonadjudicative proceedings under the Code.[114] To label an official as a registrar and describe his functions as "nonjudicial" is not determinative of constitutionality, however. The Supreme Court consistently has disregarded form and examined the character and effects of the action taken to determine its true nature;[115] the controlling factor in characterizing a proceeding as judicial or nonjudicial is whether it is accorded finality when an interested party fails to appeal.[116] Since informal probate and private settlement of estates are, at the latest, conclusive three years after the death of the decedent,[117] they clearly have the same effect as adjudicative proceedings.[118]

The provisions for settlement of estates without any contact with a court further demonstrate the view of the UPC drafters that succession to the estate of a decedent should not be a matter for judicial resolution unless the intervention of a court is requested by an interested party.[119] This manner of settlement cannot necessarily escape the requirements of due process simply by virtue of its private nature. When the effect of private action is to bring about that which could be proscribed if accomplished through state action, the state may violate due process by making its courts available to enforce such action.[120]

---

114. UNIFORM PROBATE CODE §§ 1-307; 3-105; art. III, pt. 3.

115. "Whether the act done by him was judicial or not is to be determined by its character, and not by the character of the agent." *Ex parte* Virginia, 100 U.S. 339, 348 (1879).

116. One ground urged for exception to the need for notice is that the settlement of . . . accounts was in the nature of an "administrative and ministerial" function rather than "judicial" in character . . . . But the defendant's insistence that the decrees . . . were judgments with all the attributes of binding effect and conclusiveness . . . concedes the judicial character of the proceeding.

Hollis v. Tilton, 5 A.2d 29, 34 (N.H. 1939).

117. UNIFORM PROBATE CODE §§ 3-103, 3-1006.

118. The heirs at law . . . have the right to be present at the hearing; and if they are not notified thereof, and an order is made without giving them an opportunity to be heard . . . they would stand in very much the same position as if a judgment had been rendered against them without bringing them into court, and giving them an opportunity to answer or defend.

In re Estate of Charlebois, 6 Mont. 373, 376, 12 P. 775, 777 (1887).

119. UNIFORM PROBATE CODE art. III, General Comment.

120. *See* Shelley v. Kraemer, 334 U.S. 1 (1948). Admittedly, this argument depends on a broad interpretation of *Shelley*. It seems, however, that court action sanctioning a deprivation of property that might have never occurred but for the infirmities that inhere in a statutory scheme might be prohibited even under a more narrow reading of that opinion.

Moreover, the private action provisions of the UPC may not be "private" at all. Since such action becomes final by operation of law, it seems to constitute state action in its purest sense. Thus, inasmuch as the UPC provides that passing of title by private action is enforceable in the courts, due process must be observed.[121]

Finally, proponents argue that a strong state interest in the settlement of decedents' estates justifies the no-notice provisions of the UPC.[122] The drafters of the Code take the position that the public interest in speed, efficiency, and lower costs in settling estates outweighs the interests of heirs and beneficiaries in receiving notice.[123] The Supreme Court, however, has applied a balancing test to determine both the form of notice that satisfies the requirements of due process[124] and when that

121. An additional state action argument can be made by drawing a parallel between the provisions of the UPC that do away with a judicial sanction requirement and another state statutory scheme that sought to do the same thing. In Reitman v. Mulkey, 387 U.S. 369 (1967), the Supreme Court held that a referendum to amend the California constitution to prohibit the state from imposing any limitation on the right of a person to dispose of his real property was state action. The Court expressed particular concern that the amendment would have encouraged racial discrimination, since it would have repealed a prior law expressly prohibiting such discrimination.

In most non-UPC states, present law provides that estates must be settled in judicial proceedings. Since to eliminate such requirements would be to encourage deprivation of property without due process of law, the analogy to *Reitman* seems appropriate.

122. There is undeniably a strong public interest in rapid and efficient succession to the estates of decedents. *See* Case of Broderick's Will, 88 U.S. (21 Wall.) 503, 509 (1874).

123. Wellman, *supra* note 100, at 566.

124. In Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950), the Supreme Court balanced the interest of the state in settling trust accounts against the interest of trust beneficiaries in receiving notice that accounts were being closed. *Id.* at 313-14. It held that mailed notice was required for trust beneficiaries whose names and addresses were known or ascertainable with reasonable effort. *Id.* at 318. Published notice was held sufficient for beneficiaries whose names and addresses were unknown and could not be ascertained with reasonable effort, and for contingent or conjectural beneficiaries. *Id.* at 317. The Court justified minimal forms of notice for the latter two categories of beneficiaries on the theory that the practical difficulties and cost involved in identifying large numbers of beneficiaries with only remote interests in the trusts were prohibitive.

The *Mullane* balancing test for determining the form of notice necessary to satisfy the requirements of due process is directly applicable to cases involving the settlement of estates. The state interest in settling estates is similar to the state interest in settling trust accounts. The practical difficulties of notifying the parties interested in an estate are similar to those encountered in notifying trust beneficiaries whose names

notice must be provided.[125] Never has the Court permitted the deprivation of a substantial property interest without any notice.

Adherence to due process notice requirements in probate proceedings undoubtedly will increase costs and possibly will reduce the speed and efficiency of some procedures under the UPC,[126] but the difference may not be significant.[127] For example, the registrar could mail required notice to interested parties at a minimal cost. Such a requirement would not affect the ability to probate a will without the services of an attorney.[128]

Simple adjustments to UPC procedures should be viewed as a necessary and desirable consequence of constitutional fidelity. Perhaps the benefits are less easily quantified than speed and efficiency, but they are equally important—rightful heirs and devisees will not be disenfranchised and the risk of fraud or mistake in settling estates will be reduced.

---

and addresses are known or reasonably ascertainable. The cost of notifying interested parties of the settlement of a single estate generally would be much lower, however, than the cost of notifying beneficiaries of the 113 pooled trusts involved in *Mullane*. The *Mullane* balancing test, applied to pending probate proceedings, therefore leads to the conclusion that notice reasonably calculated to inform those interested persons whose names are known or reasonably ascertainable is compelled by due process.

125. The Supreme Court in Mitchell v. W.T. Grant, 416 U.S. 600 (1974), balanced the interest of a creditor holding a vendor's lien against the possessory interest of the purchaser of goods and held that seizure of the goods through a writ of sequestration did not violate due process. *Id.* at 607. The Court reasoned that although no *prior* notice was provided and no hearing was held, the vendee was adequately protected because he had been notified of a hearing to be held immediately *after* the seizure. *Id.* at 602. Moreover, the statutory requirement that the creditor post a bond afforded further protection to the vendee. *Id.* at 608.

The holding in the *Mitchell* case might be applied in the probate context to permit distribution of property prior to notification of interested parties. It cannot be relied on, however, as authority for deprivations of property without either prior or subsequent notice. And unlike the sequestration statute at issue in *Mitchell*, the UPC does not require a personal representative to post a bond before distributing the assets of an estate. *See* UNIFORM PROBATE CODE § 3-603.

126. Wellman, *supra* note 100, at 498-99.

127. *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909, 990-91 (1960).

128. The registrar would inform the petitioner of the notice requirement and instruct him to make reasonable efforts to compile a list of the names and addresses of interested persons. This added requirement is neither confusing nor complicated, and would not require the assistance of an attorney.

Requiring that interested parties be notified of probate proceedings might yield an additional benefit. It might encourage lawyers to recommend the use of the streamlined, informal procedures of the UPC rather than the costly and time-consuming formal procedures. The greatest single advantage of formal procedures is certainty. To the extent that notice requirements for informal procedures lessen the possibility of a challenge to those procedures by an unnotified interested party, their relative desirability will be enhanced.[129]

Not since the turn of the century has the Supreme Court addressed the question of the constitutionality of no-notice probate; in fact, it has expressly reserved the issue.[130] One explanation for this inattention is that since virtually all states require some form of notice at some point in probate proceedings, the issue simply has not arisen.[131] A related second explanation is that probate notice requirements have been strengthened through legislative responses to modern Supreme Court due process decisions in other areas of the law.[132] Hence, the Court simply has had little opportunity to rule on the question.[133]

The advent of the UPC at this point in the development of the law of procedural due process makes its notice provisions particularly vulnerable to judicial attack. Since most state probate codes do not now permit the settlement of estates without notification of interested parties at some stage of the proceedings,[134]

---

129. The Code might be amended to shorten the period during which informal proceedings may be contested by interested persons who received actual notice of the informal proceeding.

130. The constitutional validity of no-notice probate was the focal point of the briefs of both parties in Goodrich v. Ferris, 214 U.S. 71 (1909), but the Court "put aside" the question of "whether or not the State of California did or did not possess arbitrary power in respect to the character and length of notice to be given of the various steps in the administration of an estate in the custody of one of its courts," *id.* at 81, and decided the case on other grounds.

131. Comment, *Probate Proceedings—Administration of Decedents' Estates—The Mullane Case and Due Process of Law*, 50 MICH. L. REV. 124, 132 (1951).

132. *See* Boyd, *Constitutional, Treaty and Statutory Requirements of Probate Notice to Consuls and Aliens*, 47 IOWA L. REV. 29, 83 n.222 (1961); Hackney, *The Unconstitutionality of the Notice Provision of the Texas Probate Code*, 23 SW. L.J. 890 (1969); Kroncke, *A Decade of Probate Law*, 1961 WIS. L. REV. 82, 99-100; Stiller & Redden, *Reform in the Administration of Estates*, 29 MD. L. REV. 85 (1969).

133. The current notice requirement in proceedings for the settlement of estates is substantially embodied in statutory law rather than in case law. Tilley, *The Mullane Case: New Notice Requirements*, 30 MICH. ST. B.J., Jan. 1951, at 12, 15; *see*, Wellman, *supra* note 100, at 449.

134. *See* text accompanying notes 17-19 *supra*.

enactment of the UPC in its recommended form would result in a significant weakening of notice requirements—a reversal of the trend over the past two centuries toward stronger notice requirements in probate proceedings.[135] Coupled with the fact that the UPC no-notice provisions are inconsistent with recent Supreme Court due process decisions,[136] this result should elicit a response from the Court halting the new trend and restoring pre-UPC notice requirements. Existing case law clearly would support a ruling that the UPC no-notice provisions are unconstitutional.

The Supreme Court itself has suggested that due process requires that probate proceedings include some form of notice.[137] And lower federal courts have more clearly held that no-notice probate violates due process. At issue in *Stevens v. United States*[138] was a federal statute that provided for vesting the property of a deceased veteran in the Board of Managers of National Homes for Disabled Soldiers if the veteran had been living in a soldiers' home at the time of his death and if the property was not claimed by heirs or next of kin within five years. The statute, however, did not require that heirs and devisees be notified that the veteran had died. The wife and daughter of a veteran claimed part of his estate nine years after his death. They argued that the five-year statute of limitations did not bar their claim since the lack of notice violated due process. The Court of Appeals for the First Circuit agreed:

---

135. *See* Basye, *Determination of Heirship*, 54 MICH. L. REV. 727 (1956). Enactment of the UPC without amendment of its notice provisions may disprove the prediction of one writer that there would be no return to no-notice probate. Levy, *Probate in Common Form in the United States: The Problem of Notice in Probate Proceedings*, 1952 WIS. L. REV. 420.

136. *See* notes 75-76 *supra* and accompanying text.

137. *See, e.g.*, Hamilton v. Brown, 161 U.S. 256, 268 (1896). In Scott v. McNeal, 154 U.S. 34 (1894), a man who had disappeared for several years discovered when he returned that his estate had been settled. He thereupon challenged the settlement, arguing that he had not been notified of the proceedings. The Supreme Court voided the probate proceedings on the ground that the probate court lacked jurisdiction. Since the Court did not separate the issues of jurisdiction and notice, it is unclear whether the probate court lacked jurisdiction because the man was not dead or because he had not received notice.

The *Scott* case has been interpreted, however, as supporting the proposition that a state statute that permits probate proceedings to be concluded against a person who has not been notified of those proceedings violates due process. Fratcher, *Sovereign Immunity in Probate Proceedings*, 31 Mo. L. REV. 127, 138 (1966).

138. 89 F.2d 151 (1st Cir. 1937), *rev'd on other grounds*, 302 U.S. 623 (1938).

> It seems to us that if Congress had the power to legislate concerning the devolution of personal property . . . it should have provided for the giving of notice of his death by publication and otherwise, so that the heirs or next of kin would at least have an opportunity to assert a claim . . . within the period of five years; and that in no event should they be deprived of their rights in the estate of the deceased member without notice and an opportunity to assert a claim.[139]

Lack of notice was also held fatal in *Fennell v. United States*.[140] There the estate of the decedent contained a war risk insurance policy payable to the estate, but providing that if the holder had no heirs, the proceeds would escheat to the United States. Although the probate court determined that the plaintiff was the sole heir, the United States Government had not been notified of the impending settlement of the estate. As a result, the Court of Appeals for the Fifth Circuit voided the proceeding.

A district court reached a similar conclusion in *De Tenorio v. McGowan*.[141] In that case, a decedent died intestate in Honduras and was survived by heirs living there. Before his death, the decedent had given his brother permission to occupy and farm land that he owned in Mississippi. No proceedings were instituted in Mississippi to settle the estate. Eleven years after the death of the decedent, his brother initiated proceedings to confirm title to the land. Since the heirs in Honduras were not notified of these proceedings, the court held that they were deprived of due process and that the confirmation was void.

III. AMENDMENTS TO THE UNIFORM PROBATE CODE

The courts are not the only scene of debate over no-notice probate; even if a Supreme Court ruling on its constitutionality is not forthcoming, the no-notice provisions will continue to affect acceptance of the Uniform Probate Code by state legislatures. Several states have adopted the substantive aspects of the UPC, while altering a number of its procedural forms.[142] In seven of the 10 states enacting the UPC,[143] some or all of the no-notice provisions have been amended.[144] In six of the 10

139. *Id.* at 153.
140. 67 F.2d 768 (5th Cir. 1933).
141. 364 F. Supp. 1051 (S.D. Miss. 1973), *rev'd on other grounds*, 510 F.2d 92 (5th Cir. 1975).
142. *1974 Legislation on Trusts and Estates*, 10 REAL PROPERTY, PROBATE & TRUST L.J. 74 (1975).
143. *See* note 27 *supra*.
144. The seven states in which one or more of the no-notice provi-

states, a requirement that notice be mailed to interested parties has been added to the provisions for informal probate.[145] Conclusive establishment of intestacy by the mere passage of time has been barred in three states.[146] Notification of the informal appointment of a personal representative has been added as a requirement in two states.[147] In only three of the 10 UPC states have all proposed no-notice provisions been enacted.[148]

While the legislatures of the seven amending states have strengthened the notice provisions of the Code and narrowed the scope of the no-notice provisions, none has completely eliminated all no-notice provisions. The frequency of deviation from the proposed provisions demonstrates that the drafters of the Code seriously miscalculated the commitment of state legislatures to provide constitutionally adequate notice in probate proceedings. Those legislatures that have yet to act on the UPC undoubtedly will continue the pattern of altering the no-notice provisions. A comprehensive scheme of amendments to the UPC, designed to eliminate the no-notice provisions, should deal with the conclusive establishment of intestacy by the mere passage of time,[149] informal probate,[150] and informal appointment of personal representatives.[151] Moreover, the scope of notice required in formal proceedings[152] should be strengthened.

The conclusive establishment of intestacy by the mere passage of time[153] is one of the unconstitutional no-notice provisions of the Code. Elimination of this provision would leave formal testacy proceedings as the only method of establishing intestacy.[154] To require elaborate formal proceedings in every

---

sions have been amended are Arizona, Colorado, Idaho, Minnesota, Montana, Nebraska, and Wisconsin.

145. ARIZ. REV. STAT. ANN. § 14-3108 (Spec. Pamphlet 1974); COLO. REV. STAT. ANN. § 15-12-306 (1963); IDAHO CODE § 15-3-303(a) (Supp. 1975); MINN. STAT. § 524.3-306 (1974); NEB. REV. STAT. § 30-2220 *et seq.* (Supp. 1975); WIS. STAT. ANN. § 865.05 (Supp. 1975).

146. ARIZ. REV. STAT. ANN. § 14-3108 (Spec. Pamphlet 1974); MONT. REV. CODES ANN. § 94A-3-108 (Spec. Supp. 1975); NEB. REV. STAT. § 30-2414 (Supp. 1975).

147. MINN. STAT. § 524.3-310 (1974); NEB. REV. STAT. § 30-2220 (Supp. 1975).

148. The three states that have not altered the no-notice provisions are Alaska, North Dakota, and South Dakota.

149. UNIFORM PROBATE CODE §§ 3-108, 3-1006.

150. *Id.* § 3-306.

151. *Id.* § 3-310.

152. *Id.* § 3-403.

153. *See* text accompanying note 34 *supra.*

154. UNIFORM PROBATE CODE § 3-401; art. III, General Comment (8).

instance, however, would be inconsistent with the UPC goals of flexibility and variety of available procedures.[155] A solution to this dilemma would be to add a new section providing for informal determinations of intestacy. This procedure could be modeled after the existing procedure for informal probate of wills.[156] An application for an informal determination of intestacy would be required to contain a statement that, after reasonable efforts, the applicant was unable to discover the existence of a will.[157] The applicant would also be required to make a diligent search for the names and addresses of all heirs. Finally, notice of the informal intestacy proceedings would have to be mailed to all interested parties whose names and addresses are reasonably ascertainable.[158]

The UPC procedure for informal probate of wills[159] is also unconstitutional. Again, this defect can be corrected by simply requiring that notice of an informal probate be mailed to all interested parties.[160]

Also unconstitutional as it now operates is the procedure for informal appointment of personal representatives.[161] Notification of the informal appointment of a personal representative should be mailed to all interested parties. That notice, if provided at the time of the appointment, would render harmless some otherwise objectionable provisions of the Code. The provision making the powers of an informally appointed personal representative effective despite failure to notify heirs and devisees following the appointment[162] would no longer be troublesome if there were a requirement that notice precede the informal appointment proceedings. Similarly, the provision permitting a personal representative to close an estate without notifying interested parties[163] could be retained so long as notice of his appointment had been provided at the outset.

Finally, the provisions for notice under the formal proceedings of the UPC must be strengthened to satisfy the requirements of due process. Presently, notice of formal testacy proceedings must be provided to all heirs and to devisees named in any will

155. *Id.* art. III, General Comment.
156. *Id.* §§ 3-301 to -306.
157. *Cf. id.* § 3-301(2) (iii).
158. *See* note 124 *supra.*
159. *See* text accompanying notes 40-44 *supra.*
160. *See* note 124 *supra.*
161. *See* text accompanying notes 45-47 *supra.*
162. UNIFORM PROBATE CODE § 3-705.
163. *Id.* § 3-1003.

that has been or is being probated.[164] But notification of parties named in an unprobated, competing will, the existence of which is known by the petitioners, is not required.[165] This omission should be remedied, for it is clear in light of *Mullane* that notification of such devisees is constitutionally compelled if their names and addresses are known or can be reasonably ascertained.[166]

IV. CONCLUSION

The no-notice provisions of the UPC represent a significant departure from common law, existing statutes, and the Model Probate Code. In light of modern developments in the concept of procedural due process, the constitutionality of these provisions is at best questionable. State legislatures should continue to adopt the UPC, but at the same time they must correct constitutional deficiencies by amending the no-notice provisions.

164. *Id.* § 3-403.
165. *Id.* § 3-403, Comment.
166. *See* note 124 *supra.*